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In the
Supreme Court of the United States

October Term, 1963

No. 557

JOSEPH W. DICK, et al, *Petitioners*,

v.

ROBERT S. MCNAMARA, Secretary of Defense, et al,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement	3
Reasons for Granting the Writ	11
Conclusion	20
Appendix A	21
Appendix B	35
Appendix C	40

CASES CITED

Barnes v. *U.S.*, Court of Claims No. 335-61 18
Colbath v. *U.S.*, Court of Claims No. 399-59 17
Elder v. *Brannan*, 341 U.S. 277 ..... 12, 13
Feldman v. *Herter*, 107 U.S. App. D.C. 239, 276 F2d 485 17
Kirby v. *U.S.*, (Court of Claims) 155 F.Supp. 240 17
Mitchell v. *Cohen*, 333 U.S. 411, 92 L.Ed. 774 17
Service v. *Dulles*, 354 U.S. 363 ..... 12, 18, 19
Watson v. *U.S.*, 355 U.S. 23 ..... 12, 18, 19

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Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered May 16, 1963.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is unreported and attached

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* Other petitioners not named in the caption:
THOMAS F. VAN ARSDALE, MICHAEL J. McCONNELL, ROBERT A. McKINNEY, EDWARD J. GAYTON, LAFAYETTE F. SAWYER, WALTER G. HARDEN, MARION R. BONNEVILLE, JR., BERNARD R. SMITH, AUGUSTINE J. BORODY, COLUMBUS J. PAGE.
Other Respondents not named in the caption:
JOHN W. MACY, JR., Chairman of the United States Civil Service Commission; L. J. ANDOLSEK, ROBERT E. HAMPTON, Members of the Commission.

hereto as Appendix A. (p. 21). The Order of the United States District Court for the District of Columbia is set forth in the Certified Record, page 174.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 16, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

Whether the third proviso of Section 12 of the Veterans Preference Act of 1944, which, in cases of transfers of functions, requires the transfer of Federal employees with their transferred functions before the addition of new employees to fill their positions, is to be construed to apply to all transfers whether intra- or inter-agency or is to be limited only to "major government reorganizations" requiring Congressional action or approval and affecting only transfers between Departments and Independent Agencies, contrary to the long standing interpretation of that section by the Navy and the Civil Service Commission (Departmental Circular No. 740, Jan. 12, 1954) requiring preservation of the retention rights in transfers *within* as well as between Federal Departments or Independent Agencies.

Whether the Navy can, contrary to the decisions of the Supreme Court in *Service v. Dulles* and *Watson v. U.S.* refuse to follow its own regulations, NCPI 170.9-4, and those of the Civil Service Commission, Dep. Circular 740, January 12, 1954, thus depriving its employees of the right to transfer when the duties of their positions or units are identifiable with work that is to be transferred to a different location within a shipyard, or whether the Navy can refuse to transfer such employees and separate them through reduction in force.

STATUTES AND REGULATIONS INVOLVED

The statutory provisions involved are Section 12 of the Veterans Preference Act, 58 Stat. 390, 5 U.S.C. 861 (1944), which provides:

SECTION 12:

In any reduction in personnel in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings: *Provided*, That the length of time spent in active service in the armed forces of the United States of each such employee shall be credited in computing length of total service: *Provided further*, That preference employees whose efficiency ratings are "good" or better shall be retained in preference to all other competing employees and that preference employees whose efficiency ratings are below "good" shall be retained in preference to competing nonpreference employees who have equal or lower efficiency ratings: *And provided further*, That when any or all of the functions of any agency are transferred to or when any agency is replaced by, some other agency, or agencies, all preference employees in the function or functions transferred or in the agency which is replaced by some other agency shall first be transferred to the replacing agency, or agencies, for employment in positions for which they are qualified, before such agency, or agencies, shall appoint additional employees from any other source for such positions.

Naval Civilian Personnel Instructions ~~January 12, 1951, set forth in Appendix C, p. 40~> . . . . .

Civil Service Commission, Departmental Circular 740, ~~Instruction 170 set forth in Appendix B, p. 35~> . . . .

STATEMENT

The petitioners, who were the plaintiffs in the District

Court, where they sought and obtained a declaratory judgment (R. 174), were selected by the Navy and the National Association of Shop Analysts and Schedulers as a representative group to test before the Civil Service Commission the sole question of the application of the transfer of function proviso of Section 12 of the Veterans Preference Act of 1944 (R. 11). These employees (from Norfolk and Philadelphia) held the position of Naval Shop Analyst and Scheduler in the shop planning sections (hereinafter sometimes referred to as A & S). They constituted some 2,200 employees in the eleven Navy Ship Yards operated in the United States. (R. 6) Petitioners sued for themselves and the members of the National Association of Shop Analysts and Schedulers all of whom were similarly affected by an order issued by the Navy November 17, 1959.[1]

Petitioners contended that this order was unlawful because it transferred the functions being performed by petitioners and failed, contrary to the law and regulations then in effect, to transfer the petitioners with the work of their sections before any reduction in force was processed.

"Transfer of function" in November 1959 was governed by the third proviso of Section 12 of the Veterans Preference Act of 1944, and the then existing regulations and instructions of the Civil Service Commission and the Department of the Navy.

Section 12, Veterans Preference Act of 1944, 58 Stat. 390, 5 U.S.C. 861 (supra, p. 2) provides in pertinent part:

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[1] "There are eleven naval shipyards located along the Pacific and Atlantic coasts. Navy ships come to the shipyards for conversion, repair or alteration. The shipyard is divided into departments: The Production Department includes the shops which are each in separate buildings physically separated from the Planning Department. There are usually about 17 shops, e.g., electrical, paint, woodwork, sheet metal work, structural, etc. The number of employees in each shop may run from 60 to 3,000 in a large structural shop (CSC 182). (Paragraph 1, R. 13)

"Section 12. In any reduction in personnel in any Civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations . . . Provided . . . and provided further, that when any or all of the functions of any agency are transferred to or when any agency is replaced by, some other agency, or agencies, all preference employees in the function or functions transferred or in the agency which is replaced by some other agency shall first be transferred to the replacing agency, or agencies, for employment in positions for which they are qualified, before such agency, or agencies, shall appoint additional employees from any other source for such positions."

Furthermore, in November 1959, the Civil Service Commission had in effect an instruction issued in 1954 which specifically required transfer of employees (when functions were transferred) within an agency i.e. between departments, divisions sections or smaller organizational units. The pertinent part of this ruling follows:

"The Commission has ruled that Section 12 of the Veterans' Preference Act and thus Section 20.8(a) of the Civil Service Regulations also apply to transfers of functions within a Federal Department or Independent Agency.

. . . . . .

This action of the Commission defines "agency", as used in the third proviso of Section 12 of the Veterans' Preference Act and in Section 20.8(a) of the Civil Service Regulations. An "agency", in this context, could be an entire independent establishment, a bureau, branch, division, section, or smaller organizational entity. The applicability of Section 20.8(a) depends upon a judgment as to whether, in conjunction with a reduction in force, a function or functions of one organizational entity can be identified as having been transferred to another organizational entity. If such is found to be the case, then the incumbent or incumbents of positions engaged in the transferred functions must be given the opportunity to follow the functions prior

to any reduction in-force action which might otherwise affect them." [Departmental Circular 740, Appendix C, p. 46]

In November 1959 there were in effect Naval regulations of many years standing which specifically governed a transfer of functions such as occurred here. The transfer regulations were made specifically applicable to transfers from one location to another within a shipyard, and the term "function" was correlated with the term "work" and "duties". The pertinent parts taken from Instruction 170, Reductions-in-Force, NCPI 1703-4 (Appendix B, p. 35) follow:

"a. *** When functions are transferred from one location to another all of the Retention Group I, II and III employees involved shall be transferred with the functions. ***

b. *** The same criteria shall apply when functions are transferred to a different location within the same activity. ***

c. Identifying positions with transfer of functions.— It is necessary to make a determination as to which, if any, positions or units are identifiable with work that is to be transferred to a different location. This determination must be made whether the work is being transferred to a different location within the activity, to another naval activity, or to a different service in the Department of Defense. ***

(1) Certain duties of one or more positions are to be transferred while the unit performing the functions to be transferred will remain intact to perform remaining functions. If the majority of the duties of a position are to be transferred to another service or naval activity, the incumbent will be identified with the transfer of functions. ***

(2) Employees whose positions are being abolished because the function is being transferred to another Serv-

* A naval shipyard is a naval activity (Appendix B, p. 35)

ice or naval activity enjoy transfer of function rights even though no additional personnel are required by the Service or activity acquiring the function.

"(3) When the majority of an employee's duties are being transferred to more than one location his transfer or function rights are dependent upon the planned location of the controlling duties. . . ." ***

The District Court granted the employee's Motion for Summary Judgment declaring, as a matter of law based on the existing law and regulations, that the petitioners were engaged in a function and that the function was transferred. The Court of Appeals disagreed. The facts are not in dispute.

The sections staffed by A & S were established beginning in 1950, and charged with a special assignment developed from the recommendations of a private consulting firm that had made an extensive year-long survey seeking to modernize the shipyards. The objective was to establish a new program which would utilize "the latest production control techniques" (R. 155). A special group was selected and trained and undertook the new task of providing a detailed breakdown of work at the shop level. (R. 156). Employees in this group were given the rating of Analyst and Scheduler.

In essence the 2200 employees in these sections were engaged in precise job analysis and preparation of line detail instructions to the various shops and sections throughout the Production Department. This function was tied in with routing, scheduling, standards, material control, and cost determination. The result was to eliminate delay by permitting the leadingmen and craftsmen to proceed immediately with their portion of a job without stopping to study specifications. In other words, the scope of the section's assignment or function was to provide specific step by step instructions and to keep all facets of a job coordinated and moving toward scheduled completion dates. (R. 157, 159).

In November 1959, by order of the Navy, the work of the sections staffed by Analysts and Schedulers was lifted and moved from the Production Department to the Planning Department. These departments existed in each shipyard and were physically separated by distances of one half mile to a mile. They were also separated organizationally. The group shop masters reported through the Production officer to the Commander of the Shipyard, and the Head of the Planning Department reported through the Planning Officer to the Commander.

The Analysts and Schedulers were not moved with their sections. The rating was abolished and all were reached in a Reduction-in-Force. The Planning Division proceeded to restaff in order to continue the work formerly being done by the petitioners.

The Navy in effecting the transfer ignored its own regulations and those of the Civil Service Commission. It moved the work and recruited an additional staff to perform the functions.[2]

The Analysts and Schedulers immediately (in 1959) protested the action as unlawful and have continued to protest in every available forum. They maintain that they should have been transferred to the Planning Department with the function they were performing. Petitioners urged the application of the statute and the regulations so that, if after transfer it were necessary to reduce the number of

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[2] The government in attempting to put a better light on their actions emphasized that many A & S employees ended up in P & E. While this is true, it points up the error. The law and regulations provided a prescribed method covering transfer which was intended to place the employee whose work was transferred on an even footing with the employees in the new location who were now to perform their work. It is no answer to say that picking one here and there on a selective basis is a substitute for the enjoyment of established and enforceable rights.

employees, that they would be put into competition with the employees in the Planning Division in determining, by the statutory test of Section 12, who would be retained or eliminated. The essence of their protest is that they were all reached in a Reduction-in-Force proceeding which was processed solely in the Production Department and that the employees in the Planning Department, where their functions were now being performed, were untouched.

The Analysts and Schedulers throughout all of the Shipyards appealed to the Civil Service Commission. By agreement between the parties and with approval of the Commission a cross section of affected employees were selected and the first Commission hearing was before the Chief of the Appeals Hearing Office in Washington where sample testimony was taken (R. 21-133). All other appeals were held in abeyance.

There was little or no dispute as to the facts. (R. 87). It was agreed that the work performed in the A & S sections was a clearly identifiable and substantial course of work, that it was new as of 1950 (R. 71, 72), that special training had been given to A & S employees, that the work was transferred and was thereafter being carried on in the Planning & Estimating section of the Planning Division, and that A & S employees were assigned to instruct P & E employees on how to perform the various duties. (R. 13-15).[1]

[1] To give an idea of the comparative size and importance of A & S and P & E, a chart was introduced (R. 108, 109) showing that the A & S duties in the Production department required 2000 employees and utilized over $17,000,000 or 51% of the Planning dollar. This compares with $7,000,000 and 22% for P and E. Testimony showed that 90% of the time of A & S was devoted to preparing detailed line item instruction before the transfer. (R. 92). Plaintiff Gayton testified that he was assigned to a unit at P & E where 11 of 45 employees after the transfer spent 85% of the time in performing the same line item work as before the transfer (R. 68, 70).

The appeal was denied and further appeal was taken to the Board of Appeals and Review. The Commission itself took the appeal from the Board and decided that because there was a relationship between the nature of the detailed planning done by Analysts and Schedulers and the general planning done in the Planning Division that therefore a function had not been transferred. This was the sole basis of the adverse decision and announced a new limitation not before published.[5] The Commission expressly refrained from passing on any of the other questions presented, thus refusing to adopt an alternative basis of denial reflected in the opinion of the hearing examiner. (R 172)

On appeal to the District Court where the only substantial issue presented was whether the Sections staffed with Analysts & Schedulers were engaged in a "function," the court disagreed with the Civil Service Commission and in judgment for plaintiffs found that the defendants had not complied with the law in that a). plaintiffs were engaged in a function and b). the function had been transferred.

The government appealed to the Circuit Court of Appeals and again the only substantial questions were whether the Navy was bound by its own regulations and whether the Analysts and Schedulers were engaged in a "function" within the meaning of the statute, the petitioners taking the position with respect to the function that on the undisputed facts the Analysts and Schedulers were performing a new and different function, and in the alternative a function, under the third proviso, was no less a function because the work and duties comprising a function were related to or even identical with the work and duties of the employees in the unit to which functions were transferred.

The Court of Appeals for the District of Columbia with-

[5] The District Court decision was in response to Cross-Motions for Summary Judgment

out benefit of brief or argument or precedent on the point, undertook to define the terms "function" and "agency" by construing them as though the Veterans Preference Act of 1944 and the Reorganization Act of 1939 were to be considered in parti materia. Function was to be given the limited meaning of "authority, powers and duties when expressly authorized by law". Agency was limited in scope to statutory Departments and Independent Agencies. At no point does the Court of Appeals recognize the existence of the applicable Navy regulations.

REASONS FOR GRANTING THE WRIT

I

Aside from the fact that the Court of Appeals was clearly wrong there are immediate and important reasons why this Court should now finally complete its interpretation of the remaining heretofore unresolved transfer of function proviso of Section 12, and determine finally the scope of the protection given to transferred veterans under the Veterans Preference Act of 1944.* The far reaching effect of the lower court's decision, in addition to its impact on the frequent consolidations and reorganizations within agencies, is seen in the ever increasing movement of sections and branches out of Washington, D. C., as well as in the widespread growth of collective bargaining in government. Consequently, the number of Federal employees involved in transfers is rapidly increasing and protection of transfer rights are now of concern alike to veteran and organized federal employees.

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* The Court of Appeals recognized the importance of the decision (infra p. 22): "This is a civil service case, presenting important issues concerning the interpretation to be given the "transfer of functions" provision of Section 12 of the Veterans Preference Act of 1944; 58 Stat. 390, 5 U.S.C. Section 861 (1958) [Apparently 1958 should read 1944.]

The unique decision of the Court of Appeals, so distinctly at odds with any interpretation urged by any of the parties, has created widespread confusion which can only be settled by this Court. The provisions of Section 12 which spell out the retention rights of veterans in a reduction of force is the very heart of the Veterans Preference Act. With the exception of the proviso at issue in this case, this Court, in 1951, finally adjudicated the other provisions of Section 12, *Elder* v. *Brannan*, 341 U.S. 277, 284, 285. There remains then the settlement of the interpretation of this final, but vital, proviso to give certainty to both the government and the federal employees in the application of the retention provisions whenever employees are transferred. The question of the interpretation of the proviso has not been, but should be, passed upon by this court.

Furthermore, the judgment of the Court of Appeals should be reviewed because it is in direct conflict with this Court's holding in *Service* v. *Dulles*, 354 U.S. 363, and *Watson* v. *U.S.*, 355 U.S. 23, for it ignored entirely the employees' right to the protection of agency regulations.

II

For the veteran, and now for the organized government employee,[7] it is of the utmost importance that management not close shop, separate the employees and then transfer the work to another location to be performed by newly hired non-veteran and non-union employees. If the decision below stands then only employees transferred by statutory authority will be protected and the many thousands who are transferred annually due to intra-agency mergers, con-

[7] E. O. No. 10988, January 18, 1962, 27 F.R. 531—"Employee-Management Cooperation in the Federal Service".
Section 12 by its terms applies to all "competing employees" —veterans and non veterans.

solidations and re-locations will lose their preferential status.

It is clear from the legislative history of the Veterans Preference Act that Congress was determined to prevent the occurrence of the kind of treatment given the petitioners, that is, moving the work and leaving the veterans "out in the cold." (Testimony Congressman Starnes, infra p. 27).

Congress understood very clearly the mechanics of protection in event of transfer, for it provided that no new employees be hired "from any source" until the old employees were first transferred. Thus, the Veterans Preference Act of 1944 imposes on management a check or limitation in its freedom of action. Congress realized that unless the Act were tightly drawn, efforts would be made to avoid compliance. Consequently, in its desire, during wartime, to guarantee the protection of the preferential status of the returning Veterans, Congress anticipated and, presumably effectively, plugged a loop-hole which might have led to easy evasion of the Act. They did this by enacting the third Proviso of Section 12.[8] In essence Congress provided that when the work of a shop was transferred, the employees would transfer with the work. This prevented closing shop in one place and opening in another with new employees, who would be non-veterans performing the transferred duties. At issue is whether this proviso shall remain effective in fact as well as in ~~substance.~~ *letter.*

In 1954 the Civil Service Commission recognized formally in Departmental Circular 740 (R. 138) that what Congress had in mind was movement of one or more employees from one "organizational entity" to another.[9] The term agency

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[8] This Court recognized that the purpose of this proviso was to strengthen Veterans Preference, *Elder v. Brannan*, 341 U.S. 277, 284, 285, 95 Led 939, 946.

[9] The language of Section 12 was suggested to Congress by the Civil Service Commission (S. Rep. 907, 78th Cong. 2nd Sess.)

was thus defined broadly and in keeping with the meaning of the word as commonly used in referring to any governmental unit.[10]

The Navy and other Departments, in the years prior to 1959, accepted the broad definition of agency. The Navy in NCPI-170.9-4 (Appendix B. p. 35) significantly spelled out in clear language that the transfer of function regulations included transfers from "one location" within a shipyard to another location within a shipyard. (infra p. 36).

Other than the 1954 definition of "agency" neither the Commission nor courts prior to this case attempted to define or apply the terms "agency" or "function". Nor is there any reference to the meaning of these terms in the legislative History[11] of the Veterans Preference Act of 1944.

Hence on the basis of the existing applicable law and regulations existing in November, 1959 the action of the Navy in refusing to transfer the petitioners and the other Analysts and Schedulers was clearly unlawful. It is this refusal to abide by the applicable law and regulations that forms the basis of the petitioners' complaint (R. 5, par 12), and the District Court, recognizing the violation, granted judgment for petitioners. (R. 174).

III

Without benefit of brief or argument from any of the participants, and without the slightest hint in the legislative history, and, with what must be utter amazement by those who have been administrating the Veterans Preference

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[10] Cf., Administrative Procedures Act-Definitions 5 U.S.C. 1001(a).

[11] Report 1289, 78th Cong. 2nd Sess. accompany H.R. 4115. 90 Cong. Rec. 3505 (1944). S. Rep. 907-78th Cong. 2nd. Sess. Hearings before Senate Committee on Civil Service on S. 1762 and H.R. 4115, 78th Cong. 2nd Sess. p. 8-9.

Act for 19 years, the Court of Appeals suddenly discovered that the Veterans Act of 1944 is controlled by concepts pertinent to the Reorganization Act of 1939. (infra p. 25) Petitioner is prepared to show to the Court that Congress did not intend to handicap and restrict the administration of the "transfer of function" proviso as required by the Court of Appeals.

The appeals court would give to the term function, the meaning of "authority, powers and duties" when "expressly authorized by law" (infra p. 25), instead of the common ordinary meaning which is the work and duties that make up the functions being performed by an organizational unit.[12] To limit the transfer proviso solely to transfers resulting from statutory action authorizing reorganization pursuant to the Reorganization Act of 1939 is to take from all the thousands of employees the rights they heretofore possessed and to arbitrarily discriminate between inter- and intra- departmental transfers.

Apart from the legislative history of the Reorganization Act of 1939 and the Veterans Preference Act of 1944 which reveal two entirely different purposes and objectives, it is obvious from a consideration of the language of the Acts that the concepts recognized by the Court of Appeals find no common bottom in the legislative scheme of each. The Reorganization Act pertained solely to transfers and consolidations that could be made only by statutory authority; that Act did not define its terms, and in any event, was to have no effect after January 21, 1941.[13] Certainly, the Reorganization Act of 1939 can have no bearing on the interpretation of the Veterans Preference Act of 1944 unless it is arbitrarily assumed that the third proviso of Section 12 was to apply only to inter-agency transfers result-

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[12] Webster's New Twentieth Century Dictionary defines "function" as "3. occupation, employment."

[13] 53 Stat. 561-65, approved April 3, 1939.

ing from statutory reorganization. Nowhere is there support for such congressional intent. Yet the Court of Appeals makes this assumption. In a footnote (infra p. 28) it stated: "It would perhaps have been surprising if the Act had attempted to deal with intra-agency transfers"[14] — this with reference to the Veterans Preference Act. It is this unwarranted interpretation which so drastically limits the scope of the third proviso.

IV

It is public knowledge that there is extensive activity underway to move Federal offices out of Washington, D.C. whose efficient operation is not dependent on a location in the Capital. The Budget Bureau released on July 24, 1963 criteria for decentralizing or retaining Federal activities in the Washington Area, (Joseph Young in the Evening Star, July 25, 1963, p. 2; Jerry Klutz, Washington Post July 25, 1963). There are many factors which are causing a rapid increase in transfers; population growth is one cause, automation another.

The Bureau of the Budget asked Departments and agencies to report by September 8, 1963, on moving plans, if any. It is significant that the Bureau is thinking about intra-agency and not inter-agency transfers which would require legislation.

The Federal Employees Digest for June 24, 1963, reports that "with an increasing number of Federal agency functions being transferred to other cities and even more transfers contemplated in the future, the CSC [Civil Service Commission] feels that it is essential that a legal determination be made as to job rights in agency transfers."

[14] It would be strange indeed if Congress intended to protect the veteran only while his unit was being transferred to a new Department head or Independent Agency, and thereafter leave him without protection during the intra-agency adjustments that would ordinarily follow.

It is common knowledge that organizational entities are constantly being merged, transferred and consolidated all within Departments and Independent Agencies, and without special statutory action. With these transfers and with the acceleration of intra-agency transfers the limiting effect of the Court of Appeals decision will be costly in terms of job security for many thousands of Federal employees.

V

The position of the Court of Appeals is not consistent with its liberal approach taken in an earlier case as to the intent of Congress in adding the third proviso,[15] and it directly conflicts with the position of the Navy and the Commission in two cases now pending in the Court of Claims.[16] Prior to this case, the only Court of Appeals decision where the "transfer of function" proviso was at issue was *Feldman v. Herter*, 107 U.S. App. D.C. 239, 276 F2d 485, where the Court liberally construed the proviso. In the *Feldman* case the Court held that a clerk of a military court in Germany was entitled to follow the function when his job was abolished and the work of the court transferred to the State Department, although the State Department insisted it had no job of the exact same grade and salary.[17]

Currently at issue in the Court of Claims are two cases involving intra-agency transfers. The Navy and the Commission are defendants in each case. In one case, *Colbath v.*

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[15] Nor is it consistent with this Court's analysis of the purpose and intent of the Veteran's Preference Act expressed in *Mitchell v. Cohen*, 333 U.S. 411, 418, 419 92 L.Ed. 774, 780.

[16] The opinion is, of course, in conflict with the position of the Navy and the Commission in this case, for it was acknowledged by them that the proviso is applicable to transfers within an agency.

[17] A similar liberal attitude was reflected in the determination by the Court of Claims in *Kirby v. U.S.* (Ct. Cl.) 155 F Supp. 240

U.S., Court of Claims 399-59, the government insists that a true transfer of function takes place where the related work of a small segment is consolidated with a central office.[18] In the other case, *Barnes v. U.S.*, Court of Claims No. 335-61, the government takes an opposite position and insists that where a smaller related unit is merged with a larger unit a transfer does not take place. In both cases all parties agree that the transfer of function proviso applies to intra-agency transfers.

These conflicting positions in the light of the vastly expanding movement of government units make it imperative the meaning of the proviso be settled.

VI

The refusal of the Court of Appeals to follow the rule of this Court in accepting the existing regulations of the government agency as binding upon the parties and creat-

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[18] In this connection, in a brief filed March 1961 by the Navy in the Court of Claims in the *Colbath* case (still undecided) the Navy quite properly stated: "It must be pointed out also that the underlying purpose of a transfer of function is to promote a greater efficiency of the Government service by placing together related functions so they can operate in a consolidated fashion. Certainly this cannot be accomplished if the consolidated functions are allowed to retain all of their separate and independent characteristics. Such would merely constitute the moving of a function from one location to another without accomplishing any greater efficiency than what was had prior to the movement, and thus the sole purpose of the transfer would be defeated. This does not mean, however, that the function which is transferred has completely lost its identity and has consequently been abolished, but rather that said function has been integrated with a related working function at one location allowing both to continue operating in a more efficient and economic manner."

[19] The Civil Service Commission after this Court's decision in *Service v. Dulles* and *Watson v. U.S.* issued instructions making the agency regulations enforceable. (R.192)

ing a right in the employee to the protection given by those regulations constitutes a substantial threat to the security of all federal employees. This Court in *Service v. Dulles*, 354 U.S. 363, and *Watson v. U.S.*, 355 U.S. 23, held that agency regulations create enforceable rights. Nevertheless, in the face of Naval Civilian Personnel Instruction covering Reduction-in-Force, (Transfer of Functions NCPI 170.9-4 (Appendix B. p. 35), the Court of Appeals denied that the law governs transfers which take place from one location within a shipyard to another. That Court also ignores NCPI 170.9-4c which specifically applies function as meaning all or part of the work being performed. In fact, because the regulations of the Navy were so precise and so obviously pertinent and controlling, the Court simply refused to mention them. This, in spite of the fact that, from the first Civil Service appeal, the petitioners insisted on the government complying with the Supreme Court's ruling in *Service v. Dulles*, and *Watson v. U.S.*, (*supra*).

Petitioners submit that the Respondents are bound by the applicable regulation, and insist that nowhere; contrary to the Court of Appeals opinion, are there any regulations or statutory provisions which permit the Navy to make transfer rights depend upon employees meeting special tests or examinations[20] or upon whether a transferred employee gains a few cents pay differential. The statute

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[20] Nevertheless, throughout the opinion, the Court seems to have mistakenly assumed that the passing of a test (supra p. 23) is a matter at issue in this case. It is not, but if it were there is nothing in the record to support the Courts factual assumptions. It is not in dispute that approximately half of the petitioners and of all Analysts and Schedulers for whom this suit was brought passed the test so that the Court is mistaken in its flat statement that all petitioners had failed and the Court is equally mistaken in its assertion that passing the test assured transfer to P & E (R. 63, 64).

imposes no test or conditions. Certainly as the Commission and the Court of Appeals recognized in Feldman v. Herter, (supra p. 17), a place must be found for transferred employees whether or not a position of precisely like status and pay is available. In any event, the fact is not disputed that A & S employees and P & E employees were in the same grade and that some Analysts and Schedulers received more pay per hour than their counterparts in P & E. Further, these particular grounds were specifically eschewed as a basis for the final decision by the Civil Service Commission (R. 172) and it was improper for the Court of Appeals to go behind this decision to adopt an unsupported arbitrary assumption of the Hearing Examiner.

The effect of the appeal Court's decision is to deprive the nearly 2000 employees bound by agreement to the final adjudication of this action of the right to rely and enjoy the benefits of existing agency regulations.

CONCLUSION

For the foregoing reasons, the petitioners respectfully ask that their Petition for Certiorari be granted.

Respectfully submitted,

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REPRINT

(Appendix A)

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,216

ROBERT S. MCNAMARA, Secretary of Defense, et al.,

APPELLANTS,

v.

JOSEPH W. DECK, et al., APPELLEES

Appeal from the United States District Court for the District of Columbia

Decided May 16, 1963

Mr. Edward Berlin, Attorney, Department of Justice, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of court, with whom *Acting Assistant Attorney General Guilfoyle* and *Messrs. David C. Acheson*, United States Attorney, and *Sherman L. Cohn*, Attorney, Department of Justice, were on the brief, for appellants. *Mr. Morton Hollander*, Attorney, Department of Justice also entered an appearance for appellants.

Mr. Donald M. Murtha for appellees.

Mr. Warren E. Miller filed a brief on behalf of The National Association of Government Employees, as *amicus curiae*, urging affirmance.

Messrs. Bertram G. Davis and *John S. Mears* filed a brief on behalf of the American Legion, as *amicus curiae*, urging affirmance.

Mr. Elmer G. Neumann filed a brief on behalf of American Federation of Government Employees, as *amicus curiae*, urging affirmance.

Before WILBUR K. MILLER, FAHY and WASHINGTON, Circuit Judges.

WASHINGTON, *Circuit Judge*: This is a civil service case, presenting important issues concerning the interpretation to be given the "transfer of functions" provision of Section 12 of the Veterans Preference Act of 1944, 58 STAT. 390, 5 U.S.C. § 861 (1958). Plaintiffs-appellees, employees of the Department of the Navy rated and described as "Shop Analysts and Schedulers," brought suit in the United States District Court for the District of Columbia, alleging that certain action taken with respect to them violated their rights under that section. The District Court granted declaratory relief, and the Government has appealed.

I.

The background of the case is this:

In 1950, the Bureau of Ships, Department of the Navy, set up a "Production Planning and Control" system for altering, repairing and maintaining naval vessels at each Navy Yard. Upon notification that a vessel was coming in for alterations or repair, those employees in the Planning Division of the Navy Yard, having the rating of "Planner and Estimator" (P&E) drew up job orders for all the work to be done to the vessel in accordance with plans or design specifications, made estimates of cost, procured materials, and prepared planning schedules for the work.

The job orders then went to the Shop, or Production Department, of the Yard. There employees with the rating of "Shop Analyst and Scheduler" (A&S), whose duties were to serve as staff assistants to the Master Mechanic of the Yard, took the job order received from the Planning Division, broke it down in greater detail into the various job operations required, made their own cost estimates, scheduled the work by operations, kept an eye on its progress and on workloads, and in general established the controls over the Shop's production. The A&S position carried a lower rating and salary that the P&E position.

In 1959 the Navy Department began a reorganization—not yet completed—of the existing Production Planning and Control system. The reorganization was directed toward abolishing the duplication and repetition of effort, and cutting the costs and excessive paperwork, involved in the existing system. It abolished the A&S position, and assigned to the Planners and Estimators of the Planning Division the duty of putting the job order into the greater detail needed for scheduling work in the Production Department. A new position denominated "Shop Planner" was created in the Production Department to perform the shop planning duties which remained after the assignment to the P&E position of the duty of preparing detailed job orders. Employees with the A&S rating were given the opportunity to take an examination for the higher P&E rating, and those who passed the examination have been given the P&E rating and salary. Others with former A&S ratings are being assigned to other jobs for which they are qualified, such as "Shop Planner."

The twelve plaintiffs-appellees are former A&S employees who did not pass the test for the P&E rating.[1] Being entitled to the rights given by the Veterans Prefer-

[1] They were among those reassigned and now hold other jobs with the Navy Department.

ence Act, they appealed to the Civil Service Commission, limiting their claim by stipulation to the contention that a "transfer of function" to the Planning Division of each Navy Yard occurred when the A&S positions were abolished, within the meaning of Section 12 of the Veterans Preference Act, 58 STAT. 390, 5 U.S.C. § 861 (1958). That section provides in pertinent part:

> "In any reduction in personnel in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings: *Provided . . . And provided further*, That when any or all of the functions of any agency are transferred to, or when any agency is replaced by, some other agency, or agencies, all preference employees in the function or functions transferred or in the agency which is replaced by some other agency shall first be transferred to the replacing agency, or agencies, for employment in positions for which they are qualified, before such agency, or agencies, shall appoint additional employees from any other source for such positions."

Urging that a transfer of function had occurred, plaintiffs asserted before the Commission that they were entitled under the Act to be transferred along with their job "function" to the P&E position, without test and with seniority rights. The Commission, for reasons we will later discuss, ruled adversely to them. This litigation followed.

II.

Turning first to the text of Section 12 of the Veterans Preference Act of 1944, it is clear that Congress was primarily concerned with the problems caused by major government reorganizations. The section speaks of the situation arising "when any or all of the functions of any agency are transferred to, or when any agency is replaced by, some other agency, or agencies . . . ." This was a

situation which had frequently arisen in the years just prior to 1944. Under the authority of the Reorganization Act of 1939,[3] the President had on numerous occasions abolished or curtailed the activities of a particular agency, transferring its duties to one or more other agencies—already existing or newly created—in the interest of increased efficiency and economy in governmental operations.[4] The Reorganization Act of 1939 provided, *inter alia*, in Section 4, 53 STAT. 562, for the "transfer of the whole or any part of any agency or the functions thereof to the jurisdiction and control of any other agency;" or "the abolition of the whole or any part of any agency" whose functions have been or will be "terminated" or transferred. The word "functions" was not expressly defined, but was evidently used in the sense of "authority, powers, and duties" (see Section 8(b), 53 STAT. 563), when "expressly authorized by law" (see Section 3(f), 53 STAT. 562).[5]

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[3] 53 STAT. 561-65, approved April 3, 1939. See also Act of June 30, 1932, 47 STAT. 413.

[4] Reorganization plans promulgated under the Reorganization Act of 1939 are reproduced in the notes to 5 U.S.C.A. § 133t (Cum. Supp. 1950).

[5] The cited sections provide:

"SEC. 8. . . .

"(b) No suit, action, or other proceeding lawfully commenced by or against the head of any agency or other officer of the United States, in his official capacity or in relation to the discharge of his official duties, shall abate by reason of any *transfer of authority, power, and duties from one officer or agency of the Government to another* under the provisions of this title, but the court, on motion or supplemental petition filed at any time within twelve months after such transfer takes effect, showing a necessity for a survival of such suit, action, or other proceeding to obtain a settlement of the questions involved, may allow the same to be maintained by or against the

The Reorganization Act of 1939, in Section 4(d) (2), 53 STAT. 562, required the President to "make provision for the transfer or other disposition of the . . . personnel affected . . ." by a plan. In Section 10, 53 STAT. 563, a limited measure of job protection was given to the affected personnel.[5]

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head of the agency or other officer of the United States to whom the *authority, powers, and duties* are transferred." (Emphasis supplied.)

"SEC. 3. No reorganization plan under section 4 shall provide—

* * * *

"(f) For authorizing any agency to exercise any function which is not expressly authorized by law."

For one example, among many, of the use of the word "functions" in reorganization plans, see Reorganization Plan No. III, 5 FED.REG. 2107, 54 STAT. 1231, which provided in part:

"CIVIL AERONAUTICS AUTHORITY

"SEC. 7. *Functions of the Administrator Transferred.*—The functions vested in the Civil Aeronautics Authority by the Civilian Pilot Training Act of 1939; the functions of aircraft registration and of safety regulation described in Titles V and VI of the Civil Aeronautics Act of 1938, except the functions of prescribing safety standards, rules, and regulations and of suspending and revoking certificates after hearing; the function provided for by Section 1101 of the Civil Aeronautics Act of 1938; and the functions of appointing such officers and employees and of authorizing such expenditures and travel as may be necessary for the performance of all functions vested in the Administrator, are transferred from the Civil Aeronautics Authority to and shall be exercised by the Administrator, who shall hereafter be known as the Administrator of Civil Aeronautics."

[5] Section 10 provided:

"SEC. 10. (a) Whenever the employment of any person is terminated by a reduction of personnel as a result of a reorganization effected under this title, such person shall thereafter be

When the bill which became the Veterans Preference Act of 1944 was under consideration, veterans' groups asked for a greater measure of job protection in reorganizations. Mr. Flemming, Chairman of the Civil Service Commission, and Congressman Starnes, author of the bill, spoke as follows:

"Mr. Flemming: It [the bill] does not guarantee a job. It simply provides, if there is a transfer of that kind, that the agency to which the functions have been transferred cannot go out into the open labor market to recruit people until they have placed all preference eligibles who are qualified for positions in that agency.

"Mr. Starnes: That is one principle the veterans' organizations have fought for most vigorously. Oftentimes they have found agencies which have transferred or abolished their functions entirely and a new agency was set up in its place. The new agency then would leave the veterans in the cold and go out into the open labor market and recruit new appointees. It is a device which the veterans claim have been used against them to eliminate them from Government appointments, by simply abolishing the function or transfer the function and leaving the personnel out in the cold. That is one practice of ignoring veterans' perference." (Hearings on H.R. 4115, 78th Cong., 2d Sess., before the Senate Committee on Civil Service, May 19, 1944, p. 10)

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given preference, when qualified, whenever an appointment is made in the executive branch of the Government, but such preference shall not be effective for a period longer than twelve months from the date the employment of such person is so terminated.

"(b) Any transfer of personnel under this title shall be without change in classification or compensation, except that this requirement shall not operate after the end of the fiscal year during which the transfer is made to prevent the adjustment of classification or compensation to conform to the duties to which such transferred personnel may be assigned."

The congressional purpose was thus to protect veterans who were affected by transfers of functions from one agency to another, and the term "functions" was evidently to have the same meaning ("authority, powers, and duties") as under the Reorganization Act of 1939. Nothing in the statute or the legislative history refers to similar transfers within a single agency.[6] The regulation adopted by the Civil Service Commission in 1944 to implement Section 12 simply copied the statutory language, and spoke only of transfers between agencies. See Section 20.8 of the Regulations, 5 C.F.R. § 12.306 (1944 Supp.); 5 C.F.R. § 20.8 (1961). However, in 1954, the Commission decided that the statute and Section 20.8 of the Regulations also applied to transfers of functions within a single agency. Under date of January 12, 1954, it sent Departmental Circular No. 740 to the heads of all agencies, advising them of its conclusions. Later, on May 19, 1959, the General Counsel of the Commission rendered an opinion concerning the problems "brought about by the disestablishment of the Corpus Christi Naval Overhaul and Repair Facility," with special reference to the interpretation of Section 12 of the Veterans Preference Act. Finally, under date of June 23, 1960, the Commission issued Supplement No. 2 to Departmental Circular 740, further defining its position as to the application of Section 12.

The personnel actions complained of here took place on or about November 17, 1959. Appellees argue that only the reguluations promulgated prior to that date, together with the statute, can be considered in determining the le-

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[6] It would, perhaps, have been surprising if the Act had attempted to deal with intra-agency transfers, since the prevailing philosophy appears to have been that agency functions should vest in the head of an agency, subject to being delegated by him to any chosen subordinate or agency division. See, for example, the quotation from Reorganization Plan No. III, *supra* note 4.

gality of the action taken. Assuming for present purposes (as did the Commission) that this is so, we note first that the statute and the 1944 regulation (Section 20.8) deal only with transfers of functions between agencies, and have no direct bearing on the present case—unless the word "agency" is given some meaning not apparent on the face of the statute. We come, then, to the 1954 Departmental Circular, in which for the first time the Commission ruled that Section 12 applied to transfers within an agency. It did this by construing "agency," as used in Section 12, as including "an entire independent establishment, a bureau, branch, division, section, or smaller organizational entity." The Commission went on to say:

> "The applicability of Section 20.8(a) depends upon a judgment as to whether, in conjunction with a reduction in force, a function or functions of one organizational entity can be identified as having been transferred to another organizational entity. If such is found to be the case, then the incumbent or incumbents of positions engaged in the transferred functions must be given the opportunity to follow the functions prior to any reduction-in-force action which might otherwise affect them."

No effort, however, was made to define or explain what was meant by the terms "function" or "functions."

III.

We turn now to the administrative rulings made in the present case.

As we have noted, after the action of the Navy Department in abolishing the A&S position in 1959, appellees brought their case before the Civil Service Commission.

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[7] The Government offers no challenge to the power of the Commission to propound this broader rule, and for present purposes we assume the power existed.

The Chief Appeals Examining Officer, after hearing, concluded on the evidence before him that there had not been a transfer of functions within the meaning of the statute and the regulations in force on November 17, 1959.[8] He also held against the employees on an alternative ground:

> "Even if the contention of the attorney for the appellants is correct that some act of transfer was required, Section 20.8 of the Commission's regulations would require that the transfer of Shop Analysts and Schedulers be accomplished without change in tenure of appointment. In other words, they would have arrived in the Planning Division as Shop Analysts and

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[8] His opinion stated in pertinent part:

> "Neither the statute or regulations cited provide that a specific duty or task is a function per se. The word function is not defined in the law or the regulations and it seems to us that a function is more or something different from the duties or tasks that might be assigned to a particular position.
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> * * * * * * *
>
> "In the instant case, we have a situation where the Planner and Estimator has been directed to make a more detailed job order than the one he made heretofore. This eliminates the necessity for the Shop Analyst and Scheduler to prepare the detailed job order.
>
> "Thus, we are brought to the question—was the preparation of this detailed job order the function of the Shop Analyst and Scheduler?
>
> "We think not. The Production Control Manual clearly describes the function of the Shop Analyst and Scheduler. He is, or was, the staff assistant to the Master Mechanic in the Shop.
>
> "It seems to us that if we were to find that such a function had been transferred we would have to find some person in the Planning Division who was now performing the function of staff assistant to the Master Mechanic. As we noted hereinbefore, the function of the staff assistant did not consist solely of preparing more detailed job orders.
>
> "Thus, we find no transfer of functions has occurred . . . ."

Schedulers and in a reduction in force they would have no right to promotion to the positions of Planners and Estimators.

"In short, the result would have been exactly the same as the present action if the Department of the Navy followed the method advocated by the attorney for the appellants; a reduction in force among Shop Analysts and Schedulers."

Appeal was then taken to the Board of Appeals and Review. However, the Civil Service Commission decided to review the case itself. It held adversely to the employees in a final decision rendered on December 7, 1960.

The Civil Service Commission took the view that "in reality the primary work of the Planners and Estimators and the primary work of the Shop Analysts and Schedulers were, prior to the reorganization, operating parts of a single function and not independent and separable function." Thus, it said, "no transfer of function occurred . . . ."[9]

[9] To quote the Commission:

"As to the facts, the Commission finds from the evidence of record that the function, the identity of which is the prime issue in this appeal was, and still is, the maintenance of planning and production control in each Naval Shipyard. The Commission further finds that, whereas prior to the reorganization, the planning and production control function operated with the Planners and Estimators furnishing broad outlines of the repair and maintenance work to be performed at the Shipyards, with the Shop Analysts and Schedulers following through with more detailed instructions on the same work orders the function has, since the reorganization, been so rearranged that the preparation of the detailed instructions formerly supplied by the Shop Analysts and Schedulers has been assigned to Planners and Estimators. The evidence also discloses that the Planners and Estimators have, prior to and since the formal inception of the production control system, performed work the substance of which has been preliminary to

We think these conclusions of the Commission are solidly based in the evidence, are consistent with the applicable law and regulations, and are in accord with the interpretation and understanding of the term "function" under the Reorganization Act of 1939. The Analysts and Schedulers were individual workers, assigned as staff assistants to the Master Mechanic of the Yard. They were not an "organizational entity" within the Commission's definition of the statutory term "agency," as used in its 1954 regulation (Section 20.8). Nor did the Planners and Estimators constitute such an entity. The transfer which occurred was not the transfer of the functions of an "agency," as defined by the Commission, but the transfer of certain job duties of individual workers, or, perhaps more correctly, of a class or grade of individual workers, to workers of another class or grade.[10]

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and related to the work performed by the Shop Analysts and Schedulers, all of which work was and is identified with the planning and production control function in each Naval Shipyard. In reality the primary work of the Planners and Estimators and the primary work of the Shop Analysts and Schedulers were, prior to the reorganization, operating parts of a single function and not independent and separable functions. As a result of the reorganization the operating parts of the Shipyards' planning and production control system were streamlined to eliminate one of the parts that was found to be superfluous, i.e. the Shop Analysts and Scheduler rating. In view of the above findings of fact, The Commission agrees with and affirms the conclusion of the Appeals Examining Office that no transfer of function occurred in the various Shipyards as a result of the reorganization so as to entitle the Shop Analysts and Schedulers to move into the Planning Departments where the Planner and Estimator positions were located before a reduction in force could ensue."

[10] Appellees rely on a passage in the 1954 regulation, to the following effect:

"The rights of the employees involved can be illustrated as follows:

Though the Commission did not refer to or discuss the alternate ground of decision relied on by the Chief Appeals Examining Officer, we think that ground has considerable merit. The P&E rating was higher than the A&S rating. In a reduction in force, persons in each grade or rating compete with others in that grade: the process does not permit persons in lower grades to compete at a higher level and thus gain a promotion. A transfer followed by a reduction in force, as desired by the appellees, would thus appear to gain them little or nothing. Cf. *Powell* v. *Brannan*, 91 U.S.App.D.C. 16, 196 F.2d 871 (1952); *Cutting* v. *Higley*, 98 U.S.App.D.C. 288, 235 F.2d 515, cert. denied, 352 U.S. 883 (1956). The Navy Department, as we have noted, has provided an opportunity to appellees to qualify for the higher P&E rating, by examination. It has

> "EXAMPLE A: All the functions of Section X in Division Y in a Federal Department are being transferred to Division Z in the same Department. Division Y and Division Z are both in the same commuting area. Section X is composed of 100 employees, but after the transfer of functions there will be fifty surplus positions in Division Z.
>
> "*Step 1*—Any employees in Section X who will otherwise be involuntarily separated or demoted must be offered the opportunity to follow the functions. Employees who do not accept may be separated under Part 9 or Part 22 of the Commission's Regulations.
>
> "*Step 2*—A reduction in force situation exists in Division Z and the Retention Preference Regulations relating to reduction in force must be applied. Employees reached for separation or demotion have reassignment and retreat rights as employees of Division Z. Separated career employees are placed on the reemployment priority list and receive full benefits of the program for separated career employees (displacement, priority referral, and priority certification)."

Appellees' reliance on this example seems misplaced. "All the functions" of a section were not transferred in the present case: some of the duties of particular workers no doubt were.

also offered other jobs to appellees. We do not think that the law required it to do more.

For these reasons, the cause will be remanded to the District Court with directions that the judgment for the appellees be vacated and the motion of appellants for summary judgment be granted.

So ordered.

APPENDIX B

The Navy Civilian Personnel Instruction applicable to Reductions in Force provides in pertinent part:

INSTRUCTION 170

REDUCTIONS IN FORCE

SECTION 1. LEGAL BASIS

. . . . . .

1-1. VETERANS' PREFERENCE ACT.—The Veterans' Preference Act of 1944 (58 Stat. 387; 5 USC 851-869), as amended, is the basic law governing reduction in force. Section 12 of this Act specifically prescribes reduction-in-force criteria. Sections 11 and 19 of the Act authorize and direct the Civil Service Commission to issue and enforce regulations to carry out the provisions, intent and purpose of the Act. Section 19 also provides that agencies must comply with decisions of the Commission. Sections 11, 12 and 19 are quoted in NCPI 170. 11-Encl. 1.

SECTION 4. BASIC FACTORS IN REDUCTION IN FORCE

. . . . . .

4-1. COMPETITIVE AREAS.

(2) *Naval activity (field service).*—In the field service the following will be considered as naval activities:

(b) Naval Shipyard.

SECTION 9. PROCEDURES FOR SPECIAL CIRCUMSTANCES

. . . . . .

9-4. TRANSFER OF FUNCTIONS.—The term service as used herein shall include each military department of the Department of Defense and the Office of the Secretary of Defense:

a. From or to another Federal agency, service of the Department of Defense or naval activity.—When functions are transferred from one location to

another all of the Retention Group I, II and III employees involved shall be transferred with the functions. The same action shall be taken whether the transfer is between Federal agencies, services of the Department of Defense or naval activities. The tenure of employees transferred shall not be changed regardless of whether they are in a duty or nonduty, pay or nonpay status.

b. Policy.—The policy outlined in (1) through (4) below was established by the Department of Defense for the purpose of assuring equitable and uniform treatment of employees when functions to which they were assigned are transferred from one service of the Department of Defense to another, or from one naval activity to another. The same criteria shall apply when functions are transferred to a different location within the same activity. They will apply also to similar actions involving transfer from or to another Government agency when not inconsistent with any provision of law or agreement relating to a particular transfer or consolidation:

(1) The work being performed by one service or naval activity is to be taken over by another service or naval activity. This will be considered a transfer of function if there is reasonable expectation that the work being transferred will continue for more than 60 days.

(2) The work of one service or naval activity is simply being cancelled and no corresponding function is being assumed by another service or naval activity. This will result in a reduction in force solely by the service or naval activity whose work is cancelled.

(3) A combination of transfer of some continuing functions and a cancellation to be taken will depend upon the separability of the two groups of functions. When it is not possible to differentiate between personnel working on that portion of the work subject to reduction in force due to cancellation of work and that portion being transferred, the entire action will be handled as a transfer of function.

(4) One service or naval activity is transferring real property to another service or naval activity, but not the work being performed on that property. The work of the employees directly engaged in the custody and maintenance of the real property will be considered to have been transferred to the receiving service. Employees other than those directly and primarily engaged in the custody, protection and maintenance of the real property do not have regulatory rights to consideration for transfer. However, to the maximum extent possible in hiring to meet its requirements, the gaining service will give priority consideration to the employees of the losing service.

c. Identifying positions with transfer of functions.— It is necessary to make a determination as to which, if any, positions or units are identifiable with work that is to be transferred to a different location. This determination must be made whether the work is being transferred to a different location within the activity, to another naval activity or to a different service in the Department of Defense. Transfers between activities or services should be made by, or with the concurrence of the Bureaus concerned. Should management bureaus or offices concerned fail

to reach agreement, the case will be forwarded to the Assistant Secretary of the Navy (Personnel and Reserve Forces) for final resolution. The determination should be made sufficiently in advance to meet notice requirements of any related reduction-in-force action or separation of employees who decline offer to move with their functions. The following criteria in addition to those outlined in *b* above will be used to make the determination:

(1) Certain duties of one or more positions are to be transferred while the unit performing the functions to be transferred will remain intact to perform remaining functions. If the majority of the duties of a position are to be transferred to another service or naval activity, the incumbent will be identified with the transfer of functions. However, if grade-controlling duties are involved the employee's rights will be based on the location of the higher grade duties rather than the majority of duties.

(2) Employees whose positions are being abolished because the function is being transferred to another Service or naval activity enjoy transfer of function rights even though no additional personnel are required by the Service or activity acquiring the function.

(3) When the majority of an employee's duties are being transferred to more than one location his transfer or function rights are dependent upon the planned location of the largest portion of his duties unless grade-controlling duties are involved (see (1) above). If a determination cannot be made as to which activity will receive a majority of

the duties (or grade-controlling duties) the employee will be identified with one of the activities by administrative determination.

(4) An employee providing service or support to an organization being transferred is to be identified with the transfer of functions if it is determined that more than half of his duties are devoted to the organization being transferred. For example, a Public Works Laborer Cleaner is assigned to clean offices in a Division of another Department that is being transferred. The Laborer Cleaner would be identified with the transfer.

APPENDIX C

Regulations of the Civil Service Commission

The following are pertinent excerpts taken from the complete text at R. 138-142:

UNITED STATES CIVIL SERVICE COMMISSION
WASHINGTON 25, D. C.

January 12, 1954

DEPARTMENTAL CIRCULAR NO. 740
TO HEADS OF DEPARTMENTS AND INDEPENDENT ESTABLISHMENTS

SUBJECT: Application of Retention Preference Regulations to a Transfer of Functions.

A. *Application of Section 20.8 (a) of the Regulations*

In connection with a recent action, the Commission thoroughly considered the intent of that provision of Section 12 of the Veterans' Preference Act of 1944, as amended, relating to transfers of functions. Heretofore, this provision of law and the Civil Service Regulations implementing it have been held to apply only to transfers of functions between Federal Departments or Independent Agencies. The Commission has ruled that Section 12 of the Veterans' Preference Act and thus Section 20.8 (a) of the Civil Service Regulations also apply to transfers of functions within a Federal Department or Independent Agency. The Commission also ruled that the provisions of Section 20.8 (b) do not apply when there is a transfer of functions from one organizational unit to another and the first unit is abolished.

This action of the Commission defines "agency", as used in the third proviso of Section 12 of the Veterans' Preference Act and in Section 20.8 (a) of the Civil Service Regulations. An "agency", in this context, could be an entire

independent establishment, a bureau, branch, division, section, or smaller organizational entity. The applicability of Section 20.8 (a) depends upon a judgment as to whether, in conjunction with a reduction in force, a function or functions of one organizational entity can be identified as having been transferred to another organizational entity. If such is found to be the case, then the incumbent or incumbents of positions engaged in the transferred functions must be given the opportunity to follow the functions prior to any reduction-in-force action which might otherwise affect them.

The rights of the employees involved can be illustrated as follows:

EXAMPLE A: All the functions of Section X in Division Y in a Federal Department are being transferred to Division Z in the same Department, Division Y and Division Z are both in the same commuting area. Section X is composed of 100 employees, but after the transfer of functions there will be fifty surplus positions in Division Z.

Step 1—Any employees in Section X who will otherwise be involuntarily separated or demoted must be offered the opportunity to follow the functions. Employees who do not accept may be separated under Part 9 or Part 22 of the Commission's Regulations.

Step 2—A reduction in force situation exists in Division Z and the Retention Preference Regulations relating to reduction in force must be applied. Employees reached for separation or demotion have reassignment and retreat rights as employees of Division Z. Separated career employees are placed on the reemployment priority list and receive full benefits of the program for separated career employees (displacement, priority referral, and priority certification).

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes and regulations involved	2
Statement	2
1. The reduction in force	2
2. Proceedings in the Civil Service Commission	4
3. Judicial proceedings	5
Argument	7
Conclusion	15
Appendix	16

CITATIONS

Cases:	
Boylan v. *Quarles*, 235 F. 2d 834	7
Cutting v. *Higley*, 235 F. 2d 515, certiorari denied, 352 U.S. 883	14
Eberlein v. *United States*, 257 U.S. 82	7
Hargett v. *Summerfield*, 243 F. 2d 29, certiorari denied, 353 U.S. 970	7
Hoffland v. *Seaton*, 265 F. 2d 363, certiorari denied, 361 U.S. 837	7
Keim v. *United States*, 177 U.S. 290	7
Pelicone v. *Hodges*, No. 17467, decided June 13, 1963	7
Powell v. *Brannan*, 196 F. 2d 871	7
Service v. *Dulles*, 354 U.S. 363	14

708-758—63——1

Statutes and regulations:

	Page
Veterans' Preference Act of 1944, Section 12, 58 Stat. 390, as amended, 5 U.S.C. 861	2, 4, 8, 16
5 C.F.R. 20.2(e)	9
5 C.F.R. 20.2(f)	9
5 C.F.R. 20.5	17
5 C.F.R. 20.5(b)	17
5 C.F.R. 20.5(d)	17
5 C.F.R. 20.5 (d) (1)	17
5 C.F.R. 20.5(d)(3)	17
5 C.F.R. 20.8	17
5 C.F.R. 20.8(a)	8, 18

Miscellaneous:

Civil Service Commission Departmental Circular No. 740	8
Civil Service Commission Departmental Circular No. 740, Supp. No. 2	8, 13
Navy Civilian Personnel Instruction 170:	
1-1	18
1-3	18
2-2	19
2-2a	19
2-2b	19
2-2f	19
2-4	19
2-4c	19
2-4d	20
2-4e	20
4-1a	20
4-1a(1)	20
4-1a(2)	10, 21
4-1b	21
4-1b(2)	21
4-2	21
4-2a	22
4-2a(2)	22

Miscellaneous—Continued
Navy Civilian Personnel Instruction 170—Continued

	Page
8-1	22
8-1i	22
8-2a	22
8-2a(1)	22
8-2a(2)	22
8-2c(4)	22
8-4	23
8-4a	23
8-4a(2)	23
9-4	10, 23
9-4a	24
9-4b	24
9-4b(1)	10, 24
9-4b(2)	24
9-4b(3)	24
9-4b(4)	24
9-4c	25
9-4c(1)	26
9-4c(2)	26
9-4c(3)	26
9-4c(4)	26

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 357

JOSEPH W. DICK ET AL., PETITIONERS

v.

ROBERT S. MCNAMARA, SECRETARY OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The order of the United States District Court for the District of Columbia (R. 174)[1] is not reported. The opinion of the United States Court of Appeals for the District of Columbia Circuit reversing the judgment of the district court (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on May 16, 1963. The petition for a writ of certiorari was filed on August 9, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] All record references are to the Joint Appendix submitted in the court of appeals and filed here pursuant to Rule 21 of this Court.

QUESTION PRESENTED

Whether a reorganization of personnel duties in naval shipyards constituted a "transfer of function" within the meaning of the Veterans' Preference Act, 5 U.S.C. 861, so as confer on the affected employees transfer rights which must be recognized before the application of reduction-in-force procedures.

STATUTES AND REGULATIONS INVOLVED

The pertinent portions of the Veterans' Preference Act, 58 Stat. 390, as amended, 5 U.S.C. 861, of the regulations of the Civil Service Commission, 5 C.F.R. Part 20, and of Department of the Navy Civilian Personnel Instructions 170, are set forth in the Appendix, *infra*, pp. 16–26.

STATEMENT

Petitioners, civilian employees of the Department of the Navy, brought this action for judicial review of an adjudication of their employment status by the Civil Service Commission following a reorganization of work assignments with respect to one of the functions performed in the several naval shipyards. The relevant facts, which are not in dispute, may be summarized as follows:

1. THE REDUCTION IN FORCE

The Department of the Navy established, in 1950, a Production, Planning and Control system for the programming of work performed within the various naval shipyards (R. 13). Employees in the shipyards who held the existing rating of Planner and Estimator were assigned the responsibility for drawing up

preliminary plans for vessel repair and maintenance work (R. 10). A new rating, denominated Shop Analyst and Scheduler, was created, and the employees who acquired this rating were assigned the task of refining in greater detail the preliminary plans prepared by the Planners and Estimators (R. 10).[2] The Planners and Estimators were in a different competitive level from, and received a higher rate of pay than, the Analysts and Schedulers (R. 163). Petitioners were employed as Shop Analysts and Schedulers (R. 5).

This division of planning work continued until November 1959, when, as the result of a study conducted by the Navy's Bureau of Ships, a reorganization of the existing Production Planning and Control Program was directed (R. 95). The reorganization was prompted by the realization that there was, in fact, a substantial duplication of effort and repetition of thought processes between the Planners and Estimators and the Analysts and Schedulers (R. 165, 166). It was determined that a reorganization of the planning operation would result in a considerable saving in planning overhead (R. 95). The duties of the detailed planning that were formerly the responsibility of the employees holding the Analysts and Schedulers rating were assigned to the Planners and Estimators, who in addition retained their previously assigned tasks (R. 166, 167). Other tasks

[2] There is no separate position for a Planner and for an Estimator. The one rating, Planner and Estimator, is given to each individual so rated. A similar situation exists as to the position of Shop Analyst and Scheduler.

formerly assigned to the Analysts and Schedulers were reassigned to other employees in the shipyards. The Analyst and Scheduler rating was abolished (R. 166). A reduction-in-force procedure was therefore applied to that competitive rating, which constituted a separate level within the shipyards, and the Analysts and Schedulers were accordingly reassigned to those other positions for which they were qualified that involved the least grade reduction (R. 167).

In order to perform the increased workload of the Planners and Estimators, additional positions were created in that rating. To fill these jobs the Navy Department held a competitive examination and urged all former Analysts and Schedulers to compete for the higher-rated and higher-paid positions (R. 54). Those qualifying received promotions to the higher grade positions. No former Analyst and Scheduler was involuntarily separated.

2. PROCEEDINGS IN THE CIVIL SERVICE COMMISSION

A number of appeals were filed with the Commission by former Analysts and Schedulers affected by the reduction-in-force (R. 19). They contended that the reorganization had resulted in a "transfer of functions", and that, under Section 12 of the Veterans' Preference Act, 58 Stat. 390, as amended, 5 U.S.C. 861, and the pertinent regulations of the Commission and the Navy Department, they were entitled to be transferred to the Planner and Estimator rating along with their previously assigned duties prior to the application of the reduction-in-

force procedures (R. 19). To resolve the issue common to each of the appeals, *i.e.*, whether there had been in fact a transfer of a function from the Analyst and Scheduler rating to the Planner and Estimator rating, twelve representative test cases—those of petitioners—were presented to the chief of the Commission's Appeals Examining Office (R. 19, 20). After full hearing and argument, the Appeals Examiner concluded that, on the basis of the facts presented, no transfer of function had occurred within the meaning of the pertinent statute and regulations (R. 169). Petitioners appealed to the Commission's Board of Appeals and Review. The Board, in turn, submitted the case to the Commission for decision (R. 170).

The Commission affirmed, finding that "the function" involved in this case "was, and still is, the maintenance of planning and production control in each Naval Shipyard" (R. 171), and that no transfer of function had occurred here.

3. JUDICIAL PROCEEDINGS

Petitioners sought declaratory relief in the district court (R. 3), alleging, *inter alia*, that the Commission had acted unlawfully in failing to transfer the Shop Analysts and Schedulers to the Planners and Estimators rating, prior to the application of reduction-in-force procedure. The dispute was heard on cross-motions for summary judgment and the district court, without opinion, granted petitioners' motion and denied that of the government (R. 174).

708-755—63——2

The court of appeals reversed, remanding the cause to the district court with instructions to enter judgment in favor of the government (Pet. 34). After tracing in detail the background and purpose underlying the enactment of the transfer-of-function provision of the Veterans' Preference Act, the court noted (Pet. 32):

> We think these conclusions of the Commission are solidly based in the evidence, are consistent with the applicable law and regulations, and are in accord with the interpretation and understanding of the term "function" under the Reorganization Act of 1939. The Analysts and Schedulers were individual workers, assigned as staff assistants to the Master Mechanic of the Yard. They were not an "organizational entity" within the Commission's definition of the statutory term "agency," as used in its 1954 regulation (Section 20.8). Nor did the Planners and Estimators constitute such an entity. The transfer which occurred was not the transfer of the functions of an "agency," as defined by the Commission, but the transfer of certain job duties of individual workers, or, perhaps more correctly, of a class or grade of individual workers, to workers of another class or grade.

Additionally, the court agreed with the Appeals Examiner that a "transfer followed by a reduction in force, as desired by the [petitioners], would * * * gain them little or nothing" (Pet. 33). For the reduction-in-force process "does not permit persons in lower grades to compete at a higher level and thus gain a promotion" (*ibid.*), and, the Planner

and Estimator rating was higher than the Analyst and Scheduler rating.

ARGUMENT

In this action petitioners challenge the adjudication of their employment status by the Civil Service Commission and the Department of the Navy following a work reorganization within the several naval shipyards. The propriety of the administrative determinations was carefully considered and approved by the court below. As we show, that decision was clearly correct. Further review by this Court is not warranted.

1. It is of course fundamental that, except as provided by an Act of Congress or an administrative regulation, a federal employee enjoys neither an absolute right to the retention of his position in the civilian service nor to any particular form of procedure in his removal from that position. *Eberlein* v. *United States*, 257 U.S. 82; *Keim* v. *United States*, 177 U.S. 290; *Baylan* v. *Quarles*, 235 F. 2d 834 (C.A.D.C.). Judicial scrutiny has been afforded, therefore, primarily to insure substantial compliance with procedural requirements prescribed by statute or regulation. See *e.g.*, *Hoffiund* v. *Seaton*, 265 F. 2d 363 (C.A.D.C.), certiorari denied, 361 U.S. 837; *Hargett* v. *Summerfield*, 243 F. 2d 29 (C.A.D.C.), certiorari denied, 353 U.S. 970; *Powell* v. *Brannan*, 196 F. 2d 871 (C.A.D.C.). Cf. *Pelicone* v. *Hodges*, No. 17467 (C.A.D.C.), decided June 13, 1963. There was no departure from established procedures in this case. Involved here is simply an administrative determination that the efficiency of the operations of

the Navy's shipyards would be promoted by a reallocation of the planning and programming duties among the shipyard's personnel.

a. Section 12 of the Veterans' Preference Act provides that, when "any or all of the functions of any agency are transferred to * * * some other agency or agencies, all preference employees in the function or functions transferred * * * shall first be transferred to the replacing agency, or agencies, for employment in positions for which they are qualified, before such agency, or agencies, shall appoint additional employees from any other source for such position" (5 U.S.C. 861, *infra*, p. 16).[3] In discharge of its statutory responsibility to implement that requirement (5 U.S.C. 860), the Civil Service Commission defined "function" as a "clearly identifiable part of an agency's mission, regardless of the manner in which it is performed, and all the integral parts of the mission",[4] emphasizing that a function must be

[3] And see 5 C.F.R. 20.8(a), *infra*, pp. 17–18), for the corollary regulation provision.

This right of transfer has been extended to the transfer of functions within an agency as well as between agencies. Civil Service Commission, Departmental Circular No. 740, p. 1, issued January 12, 1954, (R. 138).

[4] Civil Service Commission Departmental Circular No. 740, Supplement No. 2, issued on June 23, 1960, set out in full at R. 145. That circular in no way established new criterion for determining when a transfer of function has occurred within the meaning of the Veterans' Preference Act. Rather, it was but a codification of what had consistently been understood to have been meant by the term "transfer of function." See, for example, the official memorandum of the Commission's General Counsel, dated May 19, 1959, explaining the applicability of Section 12 of the Veterans' Preference Act set forth at R. 131–137.

distinguished from an individual job or task as well as from the overall mission of the agency. Rather, "[a]ny activity carried on by an agency which can be identified as a recognizable segment of its overall area of responsibility may be a function."

A "transfer of function" is defined as the "transfer of the performance of a continuing function from one competitive area and its addition to one or more other competitive areas, or the movement of the competitive area in which the function is performed to another commuting area."[5] By way of explanation the Commission pointed out that, for there to be a "transfer of function," the function must "reappear in identifiable form at a new location despite its disappearance or discontinuance at its old location." The Commission additionally made clear that the "movements of activities or assignments entirely within a competitive area * * * are not considered to be transfers of functions within the meaning of the regulations. Such shifts are reorganizations within the competitive area and if any employees are to be separated or demoted as a result of the shifts the reduction in procedures must be applied" (R. 147).

---

[5] "Competitive area" is defined as "that part of an agency, usually within a local commuting area, in which employees are shifted (reassigned, promoted, and demoted) under single administrative authority, and within which competitive levels are established in reductions in force" 5 C.F.R. 20.2(e).

"Competitive level" is defined as "all similar positions within a competitive area in which employees could be readily interchanged, without undue interruption to the work program. (Such positions are in the same grade or occupational level.)" 5 C.F.R. 20.2(f).

Applying the Commission's criterion, the Navy has determined that a transfer of function in its operation occurs when the "work being performed by one service or naval activity is to be taken over by another service or naval activity." Naval Civilian Personnel Instruction,* 170.9–4b(1), *infra*, p. 24. The term "service" is defined to include "each military department of the Department of Defense and the Office of the Secretary of Defense." NCPI 170.9–4, *infra*, p. 23. The naval activity involved in this case is the "Naval Shipyard." NCPI 170.4–1a(2), *infra*, p. 20. Therefore, a function is transferred within the Navy only when an identifiable part of the Navy's mission is transferred from one Navy shipyard to another or from a shipyard to some other naval activity.

b. After determining what constituted the "function" performed herein and applying the above regulations, the Commission concluded that the Shop Analysts and Schedulers and the Planners and Estimators were engaged in the constituent tasks of the same function, to wit, planning and production control and, accordingly, that a transfer of function had not occurred. That conclusion was compelled by the facts at bar.

Prior to 1959, when a naval shipyard would be advised that a vessel was scheduled for repair work the Planners and Estimators, would, in the main, prepare Job Orders, containing a general description of the work to be performed together with necessary specifications, a designation of the shops that would

* Navy Civilian Personnel Instruction will be hereafter cited as NCPI.

be involved and the duties for which each would be responsible, an estimate of the man-days involved, and an estimate of the total labor, overhead and material costs (R. 24, 110, 162–163). The Job Order would then be routed to the Analyst and Scheduler for the preparation of a Job Process Card (R. 28). The Analyst and Scheduler would then break down the work assignments listed on the Job Order into each of the specific tasks that would have to be performed to accomplish the overall job (R. 163). The Analyst and Scheduler would also prepare Job Instruction Cards for the shop supervisors and mechanics assigned performance of the actual work, make minor material purchases, and keep check of work progress (R. 31, 114).

In the November 1959 reorganization of the Production Planning and Control Program, the Shop Analyst and Scheduler position was discontinued (R. 165, 166). The Planners and Estimators were instructed to prepare a single document designated a Job Order Process Card which replaced the three documents prepared prior to the reorganization, *i.e.*, the Job Order, the Process Card, and the Job Instruction Card (R. 33, 34). The new Job Order Process Card lists in detail the work operations to be performed, the labor, overhead, and material costs, the shops involved, the estimated number of man-hours, the work specifications, and the starting and completion dates for each shop (R. 118). Copies are forwarded to each of the shops involved for delivery direct to the first line supervisor or mechanic responsible for the accomplishment of a particular work

item (R. 34–35). Additionally, a Shop Planner position was established in each of the shops within the Production Department (R. 166). These positions are concerned chiefly with the routing and progress (follow-up) work in the shops (R. 35).

As can be seen, the 1959 reorganization was prompted by the realization that there was a substantial duplication of effort and an overlapping of planning activities within the Planning and Production Departments, and that considerable savings in planning overhead could be accomplished through a reorganization of the planning operations (R. 95, 165).

In substance, the total planning function, both prior to and following the reorganization, was performed in two divisions. In reality, as the Commission found, the primary work of both the Planners and Estimators and of the Analysts and Schedulers were, prior to the reorganization, operating parts of a single function and not independent and separable functions. As a result of the reorganization, some of the duties formerly performed by Analysts and Schedulers are now performed by Planners and Estimators. But it does not necessarily follow that a "function" has been transferred. We submit that it is for the administrative expertise to designate the appropriate "function" and that the characterization here made by the Civil Service Commission is appropriate and reasonable.

c. Additionally, the Civil Service Commission has provided that, for there to be a transfer of function, there must have been a transfer "of a continuing function from one competitive area and its addition

to one or more other competitive areas * * *." Civil Service Commission Departmental Circular No. 740, Supp. No. 2 (R. 145). And, it is clear that, irrespective of what is the appropriate function herein, it remained within, and is now being performed, by other personnel in the same competitive area, *i.e.*, in the same naval shipyard, and it is to these positions that petitioners seek promotions. This being so, a transfer of function could not, under the statute as implemented by regulations, have taken place. The reasonableness of the regulatory scheme is apparent. It would surely be detrimental to the federal service, as it would be to a private enterprise, if the administrative employer could not delegate, as he saw fit, the assignment of particular tasks to that category of personnel he deemed most efficient within his area of responsibility. To define "transfer of function" (as presumably petitioners would) as any shift in the performance of a designated task or series of tasks would surely have chaotic repercussions. It would require the reshuffling of employees each time it was determined that the efficiency of the federal service would be furthered by a shifting of job responsibilities, which in turn would often frustrate the very purpose of the shift. Mindful of the fact that a delicate balancing of interests was necessary, Congress selected a broad term and left it to the administrative expertise to supply precise meaning. We submit that the regulatory scheme adopted is wholly consistent with the legislative intendment, as the court below recognized (Pet. 32), and that there are no considerations warranting further review by this Court.

d. In any event, it is difficult to see how petitioners themselves could benefit, even on their understanding of the regulatory scheme. The Planner and Estimator rating was higher than the Analyst and Scheduler rating. And, in a reduction-in-force, employees compete only with other employees in their grade. Cf., *Cutting* v. *Higley*, 235 F. 2d 515 (C.A.D.C.), certiorari denied, 352 U.S. 883. As the court below correctly observed, "the process does not permit persons in lower grades to compete at a higher level and thus gain a promotion" (Pet. 33). Accordingly, even were petitioners' interpretation of the transfer of function provision adopted, their cause would not be advanced. The supervisors of the naval shipyards had no obligation whatever to promote petitioners to the newly added Planners and Estimators positions solely on the basis of their retention credits. Their only responsibility was to adopt a method of screening applicants that would be reasonably calculated to secure the best qualified individuals. Here, a competitive examination was conducted and all former incumbents of the Analysts and Schedulers positions were urged to compete for the higher rated positions. Those not qualifying were appointed to other positions for which they were qualified which necessitated the least grade reduction. No former Analyst and Scheduler was involuntarily separated from the federal service. The screening procedure adopted by the Navy was clearly reasonable.

2. In an endeavor to state a question worthy of this Court's consideration, invoking *Service* v. *Dulles*, 354 U.S. 363, petitioners characterize the Commission's

failure to grant them the requested transfers as a violation of the procedural rights accorded them by the Veterans' Preference Act and relevant Civil Service Commission and Navy regulations (Pet. 12–14, 19). The record plainly establishes, however, that petitioners' procedural rights have been meticulously guarded throughout the course of this litigation. In fact, a stipulated procedure was employed (R. 19). Properly analyzed, petitioners' complaint is not with procedures but, rather, with the determination made with respect to the substantive question they agreed should be decided by the Commission, which, as we have shown, turns upon the facts of this particular case and can therefore have no recurring significance.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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OCTOBER, 1963.

APPENDIX

Section 12 of the Veterans' Preference Act, 58 Stat. 390, as amended, 5 U.S.C. 861, provides:

> In any reduction in personnel in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings: *Provided*, That the length of time spent in active service in the armed forces of the United States of each such employee shall be credited in computing length of total service: *Provided further*, That preference employees whose efficiency ratings are "good" or better shall be retained in preference to all other competing employees and that preference employees whose efficiency ratings are below "good" shall be retained in preference to competing non-preference employees who have equal or lower efficiency ratings: *And provided further*, That when any or all of the functions of any agency are transferred to, or when any agency is replaced by, some other agency, or agencies, all preference employees in the function or functions transferred or in the agency which is replaced by some other agency shall first be transferred to the replacing agency, or agencies, for employment in positions for which they are qualified, before such agency, or agencies, shall appoint additional employees from any other source for such positions.

The Civil Service Commission's Retention Preference Regulations for use in Reduction in Force provide in pertinent part:

5 C.F.R. 20.5. Actions.

(b) *Employees in positions in the competitive service.* (1) No employee may be separated, furloughed for more than thirty (30) days, or reduced in pay or grade in a reduction in force while a competing employee with lower retention standing (and without retention priority based on a statutory retention right) is retained in the same competive level.

(d) *Reasonable change in position—*

(1) *How determined.* A change between positions is reasonable if the representative rate of one position is the same as the representative rate of the other position; however, if the employee cannot be changed to a position with the same representative rate, a change in position is reasonable if made with the least reduction in representative rate.

(3) *Choice of position.* An agency is not required to give an employee a choice between reasonable changes in position. Any agency is not required to fill a vacant position, to change an employee to a position with a higher representative rate, or to move an employee to a different duty station, but an agency is not prohibited from taking these actions. No employee rendering satisfactory service in a position shall be required to be displaced by a competing employee who is not qualified for such position under the regulations in this part.

5 C.F.R. 20.8. Special regulations relating to consolidations and liquidations.

(a) Before any reduction in force is made in connection with the transfer of any or all of the functions of an agency to another continuing agency, all competing employees in positions identified with such function or functions shall be transferred to such continuing agency, without change in tenure of appointment. Employees whose positions are transferred solely for the purpose of liquidation, and are not identified with operating functions specifically authorized at the time of transfer to continue in operation more than sixty (60) days, shall not be considered as competing employees for other positions in the receiving agency.

The Navy Civilian Personnel Instruction applicable to Reductions in Force provides in pertinent part:

INSTRUCTION 170
REDUCTIONS IN FORCE
SECTION 1, LEGAL BASIS

* * * * *

1-1. VETERANS' PREFERENCE ACT.—The Veterans' Preference Act of 1944 (58 Stat. 387; 5 USC 851-869), as amended, is the basic law governing reduction in force. Section 12 of this Act specifically prescribes reduction-in-force criteria. Sections 11 and 19 of the Act authorize and direct the Civil Service Commission to issue and enforce regulations to carry out the provisions, intent and purpose of the Act. Section 19 also provides that agencies must comply with decisions of the Commission. Sections 11, 12 and 19 are quoted in NCPI 170. 11-Encl. 1.

* * * * *

1-3. CIVIL SERVICE COMMISSION REGULATIONS.—Chapter Z1 of the Federal Personnel Manual contains the Civil Service Commission's Regulation 20, the Retention Preference Regulations. The provisions of Regulation 20 have been incorporated in this Instruction.

SECTION 2, GENERAL PROVISIONS

2-2. GENERAL.—Management decides what positions are necessary, when it is necessary to reduce personnel, and where and how large a reduction to make. The reduction-in-force instructions govern which employees will be affected by reduction in force after these basic determinations have been made by management. A summary of reduction-in-force procedures is as follows:

a. Competitive areas are established according to primary subdivision of an agency. In the field service each naval activity usually constitutes a competitive area.

b. Competitive levels, within which employees compete for retention, are established in each competitive area. Positions in a competitive level must be similar enough that interchange of personnel, without undue interruption to work, is feasible.

* * * * *

f. When a reduction in force in any competitive level becomes necessary, employees are reached for action in the order of their subgroup standing and within their subgroup in the order of retention credits.

* * * * *

2-4. DEFINITIONS.—Throughout this Instruction certain words and phrases which have special meaning for reduction-in-force purposes are used. The definitions of these terms are as follows:

* * * * *

c. Commuting area.—The geographic area within which people live and can reasonably be expected to travel back and forth to work in the course of their daily employment. In the field service it is determined by the Commandant of the Naval District subject to the con-

currence of the appropriate Civil Service Commission regional office. It is based on such factors as distance, availability and adequacy of public transportation facilities, cost of such transportation, and travel time required in going to and from work.

d. Competitive area.—The area within which employees compete for retention in employment in reduction in force. A normal competitive area is one complete naval activity under single command within one commuting area. Smaller competitive areas must be approved by the Civil Service Commission in accordance with NCPI 170.4–1. Larger competitive areas may be established by commanding officers upon approval of the cognizant bureau or office (See NCPI 170.4–1).

e. Competitive level.—The grouping of positions for initial reduction-in-force competition to determine which employees will be separated from and which will be retained in their positions. All positions, within a competitive area, of such similarity that interchange of personnel is feasible are placed in the same competitive level. See NCPI 170.4–2.

* * * * * *

SECTION 4. BASIC FACTORS IN REDUCTION IN FORCE

* * * * * *

4–1. COMPETITIVE AREAS.

a. Normal competitive areas.—A normal competitive area is a naval activity as defined below, within which employees are subject to being shifted (reassigned, promoted and demoted) under single administrative authority. The special patterns of competitive areas listed below have been established by the Navy Department and cleared with the Civil Service Commission.

(1) *Naval activity (departmental service).*—

In the departmental service the following will be considered as naval activities:

* * * * *

(h) Bureau of Ships.

* * * * *

(2) *Naval activity (field service).*—In the field service the following will be considered as naval activities:

(*a*) Naval District, or River Command, Staff. Headquarters.

(*b*) Naval Shipyard.

* * * * *

b. Special competitive areas.—Special competitive areas, as exceptions to the above established patterns, are approved by the Navy Department and the Civil Service Commission upon adequate justification. After a competitive area has been approved, it shall be adhered to unless reorganization of the activity has affected the original reduction-in-force plan, or the facts upon which the plan was originally based have changed. In such cases recommendation for new areas may be submitted.

* * * * *

(2) *Establishing smaller competitive areas.*

(*a*) Activities which consider that smaller competitive areas, or other special competitive areas, are essential to the efficient operation of the activity should give due consideration to the following:

1. In general, it is the policy of the Navy Department to make competitive areas as broad as possible, so as to protect the equity of employees to the maximum extent;

* * * * *

4–2. COMPETITIVE LEVELS.—A competitive level consists of all of the positions of one competitive area which are of such similarity as to duties, responsibilities, qualifications required, pay systems and working conditions that interchange of personnel is feasible. The

qualifications or sex of the particular incumbents do not establish a basis for separate competitive levels. Generally, graded positions will be of the same occupational title, but this is not necessary if the other tests are met.

a. Specific separate competitive evels.

* * * * * *

(2) Each rating listed in NCPI 250 will be in a different competitive level. Apprentices and mechanics (limited) will be in competitive levels separate from journeymen and by trade or occupation.

* * * * * *

SECTION 8, PLACEMENT, SEPARATION AND REEMPLOYMENT ASSISTANCE

* * * * * *

8–1. GENERAL. * * *

i. No right to promotion.—Employees reached for reduction-in-force action may be promoted to vacancies. See *h* above. No employee may be displaced through the promotion of another employee to a position having a higher representative rate.

* * * * * *

8–2. PLACEMENT WITHIN THE COMPETITIVE AREA.—

* * * * * *

a. Placement right within the competitive area.—An employee is entitled to a reasonable offer of reassignment if there is a continuing position in the competitive service in any other competitive level:

(1) for which he is qualified; and

(2) which is occupied by an employee in a lower retention group or subgroup.

* * * * * *

c. Reasonable offer determination.

* * * * * *

(4) *Choice of position.*—An activity is not required to give an employee a choice between reasonable changes in position. An activity is

not required to fill a vacancy, or to change an employee to a position with a higher representative rate; an activity is not, however, prohibited from taking these actions.

* * * * * *

8–4. DETERMINING QUALIFICATIONS.—When an employee has received a notification of reduction in force a determination must be made as to his qualification for other positions. There is never any question as to his qualifications for positions in the competitive level from which being separated. In making these determinations the following instructions relating to ability to perform duties, physical fitness, security requirements and eligibility for higher level positions must be observed. These instructions are equally applicable to determinations for reassignment and for entry on the Reemployment Priority List:

a. Ability to perform duties.—Subject to other requirements of this section an employee is considered "qualified" if he is capable of performing the duties of the position. In making this qualification determination the following shall be taken into account:

* * * * * *

(2) To be "qualified" he must have the knowledges, skills, techniques, and adaptability required in the position and be capable of assuming and performing acceptably such duties without training in the basic fundamentals of the position.

* * * * * *

SECTION 9. PROCEDURES FOR SPECIAL CIRCUMSTANCES

* * * * * *

9–4. TRANSFER OF FUNCTIONS.—The term service as used herein shall include each military department of the Department of Defense and the Office of the Secretary of Defense.

a. From or to another Federal agency, service of the Department of Defense or naval activity.—When functions are transferred from one location to another all of the Retention Group I, II and III employees involved shall be transferred with the functions. The same action shall be taken whether the transfer is between Federal agencies, services of the Department of Defense or naval activities. The tenure of employees transferred shall not be changed regardless of whether they are in a duty or nonduty, pay or nonpay status.

b. Policy.—The policy outlined in (1) through (4) below was established by the Department of Defense for the purpose of assuring equitable and uniform treatment of employees when functions to which they were assigned are transferred from one service of the Department of Defense to another, or from one naval activity to another. The same criteria shall apply when functions are transferred to a different location within the same activity. They will apply also to similar actions involving transfer from or to another Government agency when not inconsistent with any provision of law or agreement relating to a particular transfer or consolidation:

(1) The work being performed by one service or naval activity is to be taken over by another service or naval activity. This will be considered a transfer of function if there is reasonable expectation that the work being transferred will continue for more than 60 days.

(2) The work of one service or naval activity is simply being cancelled and no corresponding function is being assumed by another service or naval activity. This will result in a reduction in force solely by the service or naval activity whose work is cancelled.

(3) A combination of transfer of some continuing functions and a cancellation of others is involved. The action to be taken will depend

upon the separability of the two groups of functions. When it is not possible to differentiate between personnel working on that portion of the work subject to reduction in force due to cancellation of work and that portion being transferred, the entire action will be handled as a transfer of function.

(4) One service or naval activity is transferring real property to another service or naval activity, but not the work being performed on that property. The work of the employees directly engaged in the custody and maintenance of the real property will be considered to have been transferred to the receiving service. Employees other than those directly and primarily engaged in the custody, protection and maintenance of the real property do not have regulatory rights to consideration for transfer. However, to the maximum extent possible in hiring to meet its requirements, the gaining service will give priority consideration to the employees of the losing service.

c. Identifying positions with transfer of functions.—It is necessary to make a determination as to which, if any, positions or units are identifiable with work that is to be transferred to a different location. This determination must be made whether the work is being transferred to a different location within the activity, to another naval activity or to a different service in the Department of Defense. Transfers between activities or services should be made by, or with the concurrence of the Bureaus concerned. Should management bureaus or offices concerned fail to reach agreement, the case will be forwarded to the Assistant Secretary of the Navy (Personnel and Reserve Forces) for final resolution. The determination should be made sufficiently in advance to meet notice requirements of any related reduction-in-force action or separation of employees who decline offer to move with their functions.

The following criteria in addition to those outlined in *b* above will be be used to make the determination:

(1) Certain duties of one or more positions are to be transferred while the unit performing the functions to be transferred will remain intact to perform remaining functions. If the majority of the duties of a position are to be transferred to another service or naval activity, the incumbent will be identified with the transfer of functions. However, if grade-controlling duties are involved the employee's rights will be based on the location of the higher grade duties rather than the majority of duties.

(2) Employees whose positions are being abolished because the function is being transferred to another Service or naval activity enjoy transfer of function rights even though no additional personnel are required by the Service or activity acquiring the function.

(3) When the majority of an employee's duties are being transferred to more than one location his transfer of function rights are dependent upon the planned location of the largest portion of his duties unless grade-controlling duties are involved (see (1) above). If a determination cannot be made as to which activity will receive a majority of the duties (or grade-controlling duties) the employee will be identified with one of the activities by administrative determination.

(4) An employee providing service or support to an organization being transferred is to be identified with the transfer of functions if it is determined that more than half of his duties are devoted to the organization being transferred. For example, a Public Works Laborer Cleaner is assigned to clean offices in a Division of another Department that is being transferred. The Laborer Cleaner would be identified with the transfer.

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No. 357

In the
Supreme Court of the United States

October Term, 1963

JOSEPH W. DICK et al., *Petitioners*

v.

ROBERT S. McNAMARA, Secretary of Defense, et al.,
Respondents

On petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AMICUS CURIAE

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BRIEF FOR AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AMICUS CURIAE

STATEMENT OF INTEREST

The American Federation of Government Employees appeared as Amicus Curiae in the United States Court of Appeals and desires to be heard in the same capacity before this Honorable Court.

This is in accordance with Rule 42 of the United States Supreme Court, the parties having consented in writing

The American Federation of Government Employees was originally chartered by the American Federation of Labor on August 18, 1932, and is currently affiliated with the American Federation of Labor-Congress of Industrial Organizations.

The Constitution of the American Federation of Government Employees provides that its number one objective is to promote the general welfare of civilian governmental employees. (Art. II, Section 1)

The Federation is composed of more than 900 lodges and has a membership in excess of 125,000. The Federation has lodges in each of the 50 states, and in the Panama Canal Zone, Guam, Iceland and Okinawa.

In furtherance of the "Objects and Methods" of this Federation, we are concerned with legislative processes concerning our Country and our members. We must also be concerned with the judicial process insofar as administrative procedures affecting Federal employees may deviate from the Acts of Congress to the extent that said Acts may lose their purpose and intent.

Our interest is accentuated by the constant and heavy decentralization and reorganization programs being administered by the Federal Government. Currently the Federal Aviation Agency is in the throes of transferring the functions of six hundred and ten people from Washington, D. C., to the field. The Department of Defense is constantly reorganizing, decentralizing, and transferring.

In view of our large and diversified membership, we are most concerned with preventing the development, in government employment, of a practice comparable to the runaway shop, whereby an organization could destroy a Union by moving to another city or another location and hiring an entire new complement of employees.

Our interest in this situation has been further heightened by Executive Order 10987 establishing appellate rights and

Executive Order 10988, which provides for exclusive bargaining units of Federal employees.

Conceivably, an employee organization's efforts in obtaining bargaining rights under this Order could be completely frustrated by eliminating a unit holding such bargaining rights through a transfer of functions if the decision of the United States Court of Appeals is not corrected.

Argument

For the reasons stated above, the Third proviso of Section 12 of the Veterans Preference Act which governs "transfer of function" is of vital, major and immediate concern to the Federation as well as to all Federal employees. It is of prime necessity that there be certainty in the interpretation and application of this proviso.

The Federation represents to this Court that there exists as of this moment only confusion and uncertainty as to the meaning of the proviso:

1) The Court of Appeals in this case would limit protection only to transfers of "authority, powers and duties" when "expressly authoriz[ed] by law" (Pet. 25). Thus transfer rights would exist only for infrequent and sporadic transfers resulting from the operation of statutorily approved Reorganization Plans. This leaves management free from restriction as to all reorganizations not requiring statutory sanction. The Federation finds no support for such a limitation in the history or language of the Veterans Preference Act.

2) The Civil Service Commission has in effect both its 1954 Departmental Circular (R. 142) and the Supplement of 1960 (R. 145). The Commission would recognize intra-agency transfers but only if from one "competitive area" to another. This Federation is disturbed by the "competitive area" concept because no such license can be drawn from the Act, and if such license is permitted to continue the principles of job security provided under Civil Service principles

will exist only at the whim of any Agency of the Federal Government. Furthermore, no one knows what a "competitive area" is. In practice it has been whatever an agency says it is. In some instances it has included multiple states (Army Ordinance, Missile Command); in another, Battle Creek, Michigan, and Washington, D.C. (Office of Civil Defense). Moreover, there is nothing in the statute which permits such an arbitrary narrowing of the scope of the proviso.

3) As a further deviation from the statute the Civil Service Commission attempts to distinguish between transferred functions on the basis of the "identity" of functions in different locations involved in the transfer. (R. 145, 148). Again Congress made no such distinction. It must be assumed that Congress intended to give equal protection to transferred employees whether or not the functions were "really identical" (R. 148). As a perfect illustration of both the inaccuracy of this position and the inconsistency with which it is applied, we find the Commission and the Navy in 1961 in a transfer of function case now pending in the Court of Claims telling the Court in their brief: ". . . the underlying purpose of a transfer of function is to promote a greater efficiency of the Government Service by placing together *related* functions so they can operate in a consolidate fashion." *Colbath* v. *U. S.* No. 395-59 (Court of Claims). (In that case the government insisted a true transfer of function occurred.)

CONCLUSION

The Federation earnestly represents to this Court that the confusion and complexity in this area, which strains comprehension, is a direct result of ad hoc decisions made in the absence of any common understanding of the purpose and meaning of the third proviso of Sec. 12. It is now nineteen years since the passage of the Veterans Preference Act of 1944 and delay in settling this issue will result in loss of statutory rights, increase in litigation, and the inevitable demoralization resulting from continued uncertainty.

For these reasons Amicus requests that the Petition for Certiorari be granted.

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PETITIONERS REPLY TO RESPONDENTS BRIEF

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PETITIONERS REPLY TO RESPONDENTS BRIEF

Petitioner files this Reply in order to underscore the imperative need to correct the errors and ambiguities contained in the decision of the Court of Appeals so clearly revealed by the confusion apparent in Respondents understanding of the basis of that decision. In addition it is necessary to correct the constantly repetitive misstatements as to the rules and regulations in effect as of November 1959, the date petitioners rights were violated.

1. Respondents are silent as to the Circuit Courts' pronouncement that the "transfer of function" provision in the Veterans Preference Act of 1944 is now to be interpreted on the basis of concepts applicable to the Reorganization Act of 1939

Respondents acknowledge, by quoting from a definitive portion of the decision, that the court's approval of the Commission's action is specifically predicated upon the court's "interpretation and understanding of the term 'function' under the Reorganization Act of 1949." (Resp. Bf., p. 6). There they drop the issue. Respondents' silence therefore constitutes a mute appeal to this Court to grant the Petition so as to give guidance to the Commission which certainly must find the decision not only baffling but contrary to the application of the "transfer" proviso which it has followed since 1954 on an *intra-agency* basis (R. 138). The silence of the Respondents is also due, no doubt, to their knowledge that the history of the Veterans Preference Act does disclose an intent to cover intra-agency transfers. They must know, for example, that Millard Rice, National Representative of the Veterans of Foreign Wars, is the author of the transfer of functions proviso and that he testified[1] as to the scope of the problem to be corrected by that language as follows:

> "I have been very much interested in a practice that is quite a favorite in various agencies of the Federal Government, particularly the Public Works Administration that resort to the general process of abolishing a particular section. It has been their practice to put the veterans that they do not want in a certain section and then decide that that particular section is no longer needed, perhaps by transferring the functions of that particular section over to some other section, thus avoiding compliance with the law to give preference in retaining veterans."

2. Ignoring the novel conclusion of the Court of Appeals (that only *inter-agency* transfers authorized by Congress are protected by the statute), the Respondents now inject a new argument not accepted by the Court of Appeals. Respondents state repeatedly that there existed a "regulatory scheme" "recognized" by the "court below" (Resp. 13)

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[1] Hearing before Committee on Civil Service, House of Representatives, 76th Congress, in connection with HR 5101, where the proviso originally appeared

which excluded from the statutory protection transfers of function *within* a "competitive area."

Petitioner informs this court, and by record reference will show, that not only was the "competitive area" concept not in existence when the contested agency action took place but that it was never recognized by either the Civil Service Commission, the District Court or the Court of Appeals as bearing on the issues in this case.

On the contrary, the "regulatory scheme" in effect as of November 1959 made the statutory proviso expressly applicable to *intra agency* transfers and the Navy implemented this by specifically declaring that the transfer rights apply to transfers from one location to another within a shipyard.

It is the agencies' departure from the "regulatory scheme" that constitutes the basis for petitioner's claim for relief. Respondents, quite correctly, recognize that the denial of employees' rights provided by applicable rules and regulations constitutes a matter "worthy of this Court's consideration." *Service* v. *Dulles*, 354 U.S. 363 (Resp. Bf. 14, 15). However, after acknowledging the principle, Respondents then set out, by repeated statements, to lead the Court to believe that as of November 1959 there existed a rule making the "transfer of function" proviso inapplicable to transfers within a "competitive area" i.e. within a shipyard. (Resp. Bf., 9, 1st par. P. 10 and (c) on p. 12) These statements do not accord with the facts.

The fact is that in November 1959 the regulations of the Navy specifically provided that upon transfer of functions the "employees shall be transferred with the functions" and

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The issues in this case were limited by the parties through stipulation May 20, 1960 (R. 19) to the application of these existing regulations of the Commission and the "Department of the Navy."

The Civil Service Commission implemented *Service* v. *Dulles*, 354 U.S. 363, and *Watson* v. *U.S.* 355 U.S. 23 by issuing an instruction Dept. Circ. No. 1019, Sept. 18, 1959 (R. 192, 193) making departures from agency procedural regulations appealable to the Commission.

gave the same procedural protection to employees whether transferred from one shipyard to another or to a different "location within the same activity," NCPI 170, 9-4 (a), (b), (c) (Pet. 35, 36). A shipyard is defined as an "activity" NCPI 170, 4-1 a (2) (b) (Pet. 35).[1] The Respondents by remaining silent as to the provisions of 4 (b) and (c) supra, and by taking a few words out of context in subordinate paragraph 4 (b) (1) flatly represent that only transfers between shipyards are subject to the transfer of function requirements (Resp. Bf., p 10, 1st par.).

The fact is that the Civil Service Commission (as well as the Navy), since 1954, recognized the application of the "transfer" proviso to "intra-agency" transfers without limitation (Dept. Circ. 740 R. 138). This was the law in November 1959 and in order to leave no doubt as to the manner in which the Commission believed it should be applied the Commission set forth in the 1954 circular an example which fits this case exactly, and is reproduced in the Appendix C of the Petition (Pet. 41).

The further truth is that in June 1960, after the appeals herein were filed and after the Navy and the employees had stipulated to submit a pilot case for determination (R. 19), the Commission changed the rules and limited the statutory protection to transfers *between* "competitive areas". (R. 145). However, the Commission recognized the existence of pending litigation and made the new position applicable to prospective actions beginning with August 22, 1960 (R. 145, 152).

The fact is the Navy *after* the Civil Service change of June 1960 also changed its rules. It did this June 30, 1960 and specifically provided that the new rules would apply to

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[1] Significantly, this definition is included in the section dealing with "*competitive areas*" (R. 180) so that Navy Regulations were written with the clear provision that transfer of function procedures were to be followed *within* a *competitive area* and a competitive area could be larger than a naval activity (R. 179).

The stipulation provided among other things that the employees did not waive their rights to seek review in court. (R. 20).

situations arising *"on or after"* August 22, 1960. OIR Notice (R. 194, 195). The changes announced by the Navy consisted of scrapping (R. 195) the provisions in NCPI 170. 9-4 (b) and (c)[2] which gave protection to transfers from one location to another location within a shipyard. It did this, it is stated specifically, to put into effect the Commission's new concept of "area of competition". This, it goes on to say, "eliminates the problems which have previously arisen in connection with intra-activity reorganizations." (R. 194)

In light of these facts, all of record, the repeated assertions by Respondents throughout their brief that this case is governed by the "competitive area" concept cannot help but mislead the Court. As it relates to transfer of function, the words "competitive area" had never been employed. The Civil Service Commission refused to rely on this basis in upholding the Navy's action, and the concept was ignored by both the District Court and the Court of Appeals.

3. Respondents are again in error in stating that Service v. Dulles is not applicable because procedural rights were not violated (Resp. Br. 14-15). The third proviso of Sec. 12 establishes a procedural right. This right is implemented in clear language by the Commission in Dept. Circular No. 740 (Pet. 40, 41) which states that "incumbents of positions engaged in the transferred functions must be given the opportunity to follow the functions *prior* to any reduction-in-force action." As alleged in the complaint and reflected in the granting of the employees' motion for Summary Judgment, the agency processed a reduction-in-force without first transferring the employees with the transferred function. The procedure was thus unlawful from the beginning, which is the very essence of Petitioners' grievance.

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[2] NCPI (Navy Civilian Personnel Instructions) "Transfer of Function" Chapt. 170. 9-4 (Pet. 35)

The NCPI regulations covering transfer of function carry the printing date 1958

Contrary to the view of Respondents, it is this practice of ignoring employees' rights, with resultant demoralization of employees and burdensome litigation, that has recurring significance. It is a practice which should now be discouraged and only consideration by this Court can accomplish that necessary result.

4. Finally, Petitioners are prepared to show to the Court, if Petition is granted again contrary to the declarations of Respondents, that grave harm has been done to the Petitioners. Each of them was reached by reduction in force resulting in an immediate curtailment of 8% of their wages. It is of no weight to suggest that many of them were able subsequently to transfer to other jobs or were retained in lesser positions. Wherever they are, their standing has been affected.

Petitioners are also prepared to show that *Cutting v. Higley* 235 F. 2d 515 did not involve transfer of function, and has no bearing on this case. Furthermore, no promotions are involved here. Employees of both groups were being paid according to the base grade of their skilled craft plus a differential which, because of separate formulae (R. 189), resulted in some Analysts and Schedulers being paid more than Planners and Estimators. However, of more significance is the language of the third proviso which places no limitation on transfers pitched on variations in wage formulae. *Feldman v. Hester*, 276 F 2d 485.

CONCLUSION

For the foregoing reasons, and those set forth in the Petition, it is respectfully submitted that the petition for a writ of certiorari be granted.

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